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No. _____

IN THE
Supreme Court Of The United States

OCTOBER TERM 1983

UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
BRADLEY JESSON, CHAIRMAN; JACQUELINE
DOUGLAS; ROBERT PUGH; HUGH CHALMERS;
JACK WILLIAMS; HALL McADAMS, III;
KANEASTER HODGES, JR.; GUS BLASS, II;
M. A. JACKSON, M.D.; W. SYKES
HARRIS, SR.; MEMBERS OF THE BOARD *Petitioners*
VS.

RACHEL GREER & ROSE MARIE WORD *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEVE CLARK, *Attorney General*
RAY TRAMMELL, *General Counsel*
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Counsel for the Petitioners

QUESTION PRESENTED FOR REVIEW

Whether a person may intervene pursuant to Rule 24 (b) of the Federal Rules of Civil Procedure, in a Title VII case which has not been certified as a class action, if the person has not timely filed a charge of discrimination with the Equal Employment Opportunity Commission and has not received and timely acted upon a right to sue letter.

PARTIES TO THIS PROCEEDING

The parties herein are as contained in the caption of this case, and these are all the parties to the proceeding in the court whose judgment is sought to be reviewed, with the exception of Pat Behlar and Herman B. Smith who have no interest in the outcome of this petition. Ms. Behlar's complaint was dismissed at the trial level and affirmed on appeal. Dr. Smith is no longer the Chancellor. The listing of the members of the Board of Trustees includes the members who have replaced those whose terms have expired since the case was first filed and appealed.

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OCTOBER TERM 1983

UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
BRADLEY JESSON, CHAIRMAN; JACQUELINE
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KANEASTER HODGES, JR.; GUS BLASS, II;
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vs.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has not been reported. It is styled *Behlar v. Smith, et al.*, No. 82-2062, *Greer v. Smith, et al.*, No. 82-2241, *Greer v. Smith, et al.*, No. 82-2271, filed on October 27, 1983 and is reprinted in the Appendix A hereto.

STATEMENT OF JURISDICTIONAL GROUNDS

The jurisdiction of this Court is involved pursuant to 28 U.S.C. § 1254 which provides in pertinent part as follows:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon petition by any party to any civil or criminal case, before or after rendition of judgment or decree;
- (2) . . .

and pursuant to Rule 17.1 of the Rules of the Supreme Court of the United States which provides special and important reasons to grant the writ, in part as follows:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The date of judgment sought to be reviewed and the time of its entry was October 27, 1983. This petition is timely filed on or before January 25, 1984.

STATUTES AND RULES WHICH THE CASE INVOLVES

This case involves an interpretation of Rule 24 of the Federal Rules of Civil Procedure, specifically, Rule 24 (b) (2) which provides that a district court may grant an application for intervention "when an applicant's claim or defense and the main action have a question of law and fact in common."

Also involved in this case are sections of Title VII to the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (e) and (f) (1) regarding jurisdictional prerequisites to suit. Those sections are reprinted in the Appendix B hereto.

STATEMENT OF THE CASE

In July 1979 plaintiff Greer was rejected for the position of Department Head of the Health, Physical Education Department at the University of Arkansas at Pine Bluff. She filed a charge of sex discrimination with the Equal Employment Opportunity Commission and a fact finding conference was held in October of 1979. In November 1979 she filed another charge of retaliation on which another fact finding conference was held in January of 1980. A conciliation agreement was not reached and she filed suit in May of 1980. She filed an across the board class action complaint of sex discrimination in employment pursuant to 42 U.S.C. §§ 1983 and 2000e.

In July 1980 intervenor Word was rejected for the position of Director of Educational Experiences in the

Division of Teacher Education at the University of Arkansas at Pine Bluff. She filed her application for intervention in March of 1981. Her application was granted in August of 1981. The case was certified a class action in February 1982 and trial commenced in the district court for the Eastern District of Arkansas on April 19, 1982, Honorable Henry Woods, presiding.

In August of 1982 the district court ruled in favor of the plaintiffs and the defendant university appealed on numerous issues. One of the procedural issues on appeal was whether the district court had abused its discretion in granting the application for intervention prior to certifying the class when intervenor had not timely filed a charge with EEOC and had not received and acted upon a right to sue letter.

The court of appeals affirmed on all issues except on the damages for harassment which it remanded to the district court for further findings.

This petition for a writ of certiorari to the Eighth Circuit Court of Appeals is on the issue of whether a person may intervene pursuant to Rule 24 (b) of the Federal Rules of Civil Procedure, in a Title VII case which has not been certified as a class action, if the person has not timely filed a charge of discrimination with the EEOC and has not received and acted upon a right to sue letter.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 and the question is important and ripe for review because there is a split among the circuits and the ques-

tion has not been adequately addressed in the cases under Rule 24 of the Federal Rules of Civil Procedure.

BASIS FOR FEDERAL COURT JURISDICTION

The district courts have jurisdiction over claims of civil rights violations pursuant to 28 U.S.C. §§ 1343, 1344, 2201 and 2202. The civil rights violations in this case were claimed pursuant to 42 U.S.C. §§ 1983 and 2000e.

ARGUMENT

The writ for certiorari should be granted because the Eighth Circuit Court of Appeals has rendered a decision in conflict with the Ninth Circuit on the same matter. In addition, the Eighth Circuit has rendered a decision contrary to its own previous rule for permissive intervention. Finally, the Eighth Circuit's decision has so far departed from the accepted and usual course of judicial proceedings in Title VII cases, and it has so far sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

The decision which is sought to be reviewed is contained on Page 5 of the court of appeals' slip opinion, as follows:

University appellants make two claims of procedural errors on the part of the district court. The first is that the district court improperly allowed Dr. Word to intervene because she had not filed

a charge with the EEOC. It claimed that this is a jurisdictional defect that defeats the order allowing intervention under Rule 24, Federal Rules of Civil Procedure. We do not find cases under Rule 24 that clearly govern the issue. However, in cases construing Rule 23 with respect to class actions in Title VII cases, it has been held that the purpose of 42 U.S.C. § 2000e-(5) (e) is to provide notice to the charged party so as to bring to bear the voluntary compliance and conciliation functions of the EEOC. When any charge is filed, these purposes are served so there is no claim of surprise in such a situation. [cites omitted]. The University, having been apprised of the sex discrimination claims by the other individuals, cannot now claim that it was improper to allow Dr. Word to intervene so as to assert charges of the same nature.

Infra, Appendix A, at A-6.

The Court of Appeals simply ignored the cases under Rule 24 which apply to this situation.

An intervenor pursuant to Rule 24, for all intents and purposes, becomes an original party. In this case, Dr. Word's cause of action did not even arise until a year after plaintiff Greer's, and two months after the complaint was filed. According to the Eighth Circuit's decision there is no difference between one who wishes to become a member of a class and one who wishes to intervene as a named plaintiff. If that were the case, there would not be two distinct rules of civil procedure to govern two clearly distinct and different situations.

The Eighth Circuit's decision is contrary to the decision in the Ninth Circuit in *Inda v. United Airlines*, 565 F.2d 554 (9th Cir. 1971), cert. den. 435 U.S. 1007. In *Inda* the court held that timely filing of an EEOC charge is not a necessary condition to obtaining relief by one as a member of the class in whose behalf suit has been brought. If, however, one wishes to become a named plaintiff she must have secured a right to sue by timely filing with EEOC and cannot rely on an earlier filing by another employee in a non-class action. At the time Dr. Word sought intervention the case had not been certified a class action, and was not so certified until a year later. At the time the original suit was filed, Dr. Word was not a member of the class on whose behalf the suit was brought as her alleged discrimination did not occur until two months after the suit was filed.

The decision of the Eighth Circuit herein is contrary to its own previous rule that independent jurisdictional ground is required for permissive intervention. *Babcock & Wilcox v. Parsons Corp.*, 430 F.2d 531 (8th Cir. 1970). In *Babcock* jurisdiction was based on diversity of citizenship. The court distinguished between intervention as of right and permissive intervention as follows:

Jurisdiction over a claim brought by an intervenor depends on the nature of the intervention. If the intervention is a permissive one the claim must be supported by independent jurisdictional grounds. [cites omitted]

Babcock & Wilcox v. Parsons Corp., 430 F.2d at 540. In reversing the district court on its grant of intervention the court of appeals held as follows:

In summary, we conclude that Babcock was, at best, a permissive intervenor and its claim, lacking the requisite jurisdictional amount was not cognizable by a federal court. Accordingly, the judgment in favor of Babcock must be reversed.

Id. at 542.

Appellant University raised this issue on appeal, but the court of appeals did not address it. It ignored completely any consideration of the jurisdictional issue at all.

This Court has held that receiving and timely acting upon a right to sue letter is a jurisdictional prerequisite to suit under Title VII. *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973). If independent jurisdictional grounds are required for permissive intervention in diversity cases then the same rule should be applied for permissive intervention in Title VII cases. Also, if the rules for intervention and for becoming a class member are to be the same, why are there two different rules of civil procedure to govern those situations?

Other Circuits have distinguished the two situations. The Eighth Circuit should also distinguish the two situations. In *Foster v. Geuory*, 655 F.2d 1319 (D.C. Cir. 1981) the court held that the critical factor in determining whether an individual Title VII plaintiff

must file an EEOC charge, or whether he may escape the requirement by joining with another plaintiff who has filed a charge is the similarity of the two plaintiffs' complaints. The court continued, however, that where the two complaints differ to the extent that one of the claims can be resolved only by the courts, then the *Oatis* rationale does not apply. In such a case each plaintiff should be required to file separately an EEOC charge in order to effectuate the purpose of Title VII.

In the present case, although the complaints of Greer and Word appeared similar, they were separated in time by one year. The University should have been afforded the opportunity to respond to Word's charges independently of Greer's and to go through the conciliation process provided by Title VII. Word has never been required to show that filing with EEOC would have been futile. The Eighth Circuit's decision herein completely thwarts the whole purpose of Title VII, that is "to bring to bear the voluntary compliance and conciliation functions of the EEOC." *Greer v. Smith*, Slip Opinion at 5 (8th Cir. October 27, 1983), *infra*, at A-7.

There is a further split among the circuits in that the Eleventh Circuit's decision is contrary to the Ninth Circuit's. *Crawford v. United States Steel*, 660 F.2d 663 (11th Cir. 1981). In *Crawford* the situation is almost identical to the situation in *Inda v. United Airlines*, 565 F.2d 554 (9th Cir. 1977), which involved co-plaintiffs. In *Inda* the court disallowed one plaintiff's claim for failure to timely file the EEOC charge. In *Crawford* the court allowed the claims finding that al-

though timely filing of EEOC charges is a prerequisite to Title VII suit, not every original plaintiff in a multi-party non-class action must file charges as long as those who did are similarly situated. The plaintiffs in both *Inda* and *Crawford* were within the same time frame and filed as co-plaintiffs.

The situation in the present case is analogous to the situation involving co-plaintiffs in that at the time Word sought to intervene, the case was an individual action. She sought to become a named plaintiff. Her claim was not even within the same time frame as Greer's, so she had even less of a reason to expect the court to grant her intervention without the requisite filing with EEOC than the plaintiffs in either *Inda* or *Crawford*. No matter how the Eighth Circuit's decision is viewed it is contrary to and has so far departed from the usual judicial proceedings in Title VII cases as to demand supervision by this Court.

Additionally, this Court has an obligation to consider whether the district court had jurisdiction to hear Word's claim at all. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978).

This Court has previously held that a conflict in the circuits justifies grant of the writ of certiorari. *Shapiro v. United States*, 235 U.S. 412 (1914). Pursuant to this Court's Rule 17 a good reason for granting the writ is shown when the question presented for review is an important one as to call for an exercise of this Court's supervision. Title VII is an important area of civil rights law. This question is not settled, but

is in a state of confusion. The question presented herein is almost a question of first impression in that there is no clear-cut definite answer to the question.

CONCLUSION

For all the reasons and authorities cited herein, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be granted because there is conflict among the circuits; the Eighth Circuit has rendered a decision contrary to its own established rule; and the decision has so far departed from the usual course of judicial proceedings in Title VII cases as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX A

**Slip Opinion *Greer v. Smith*, No. 82-2241,
8th Circuit, October 27, 1983**

United States Court of Appeals
For the Eighth Circuit

No. 82-2062

Pat Behlar,	*
Appellant,	*
v.	*
Dr. Herman Smith, Jr.,	*
Chancellor; Board of Trustees of	*
the University of Arkansas,	*
Specifically Raymond P. Miller,	*
M.D., Chairman, Lewis Ramsey,	*
Jr., Bradley D. Jesson,	*
Kaneaster Hodges, Jr., Diane	*
Nolan, Jacquelin Douglas, Ph.D.,	*
Robert Pugh, Hugh B. Chalmers,	* Appeals from the
Jack Williams and Hall	* United States
McAdams, II,	* District Court
Appellees-Appellants/	* for the Eastern
Cross-Appellees.	* District of
	* Arkansas

No. 82-2241

Rachel Greer, et al.,	*
Appellees/Cross-	*
Appellants,	*
v.	*
Dr. Herman Smith, Jr.,	*

A-2

Chancellor; Board of Trustees *
of the University of Arkansas *
Specifically Raymond P. Miller, *
M.D., Chairman, Lewis Ramsey, *
Jr., Bradley D. Jesson, *
Kaneaster Hodges, Jr., Diane *
Nolan, Jacquelin Douglas, Ph.D., *
Robert Pugh, Hugh B. Chalmers, *
Jack Williams and Hall *
McAdams, II, *
Appellees-Appellants/ *
Cross-Appellees. *

No. 82-2271

Rachel Greer, et al., *
Appellees/Cross- *
Appellants, *
v. *
Dr. Herman Smith, Jr., *
Chancellor; Board of Trustees, *
of the University of Arkansas, *
Specifically Raymond P. Miller, *
M.D., Chairman, Lewis Ramsey, *
Jr., Bradley D. Jesson, *
Kaneaster Hodges, Jr., Diane *
Nolan, Jacqueline Douglas, Ph.D., *
Robert Pugh, Hugh B. Chalmers, *

Jack Williams and Hall	*
McAdams, II,	*
Appellees-Appellants/	*
Cross-Appellees.	*

Submitted: April 14, 1983

Filed: October 27, 1983

Before LAY, Chief Circuit Judge, McMILLIAN and
JOHN R. GIBSON, Circuit Judges.

PER CURIAM.

The Board of Trustees of the University of Arkansas and the Chancellor of the University of Arkansas at Pine Bluff were found to have discriminated against Dr. Rachel Greer, Dr. Rosemarie Word, Dr. Clara Jennings, Ms. Alma Murphy and Ms. Anne Finley because of their sex. The district court¹ awarded backpay and ordered that Dr. Greer be considered for the position of permanent chairmanship of the Health, Physical Education and Recreation Department and that Dr. Word be placed in the position of Director of Educational Experiences. Damages for harassment were awarded to Dr. Greer and Ann Finley. An unfavorable report was ordered removed from the file of Dr. Jennings. The defendants were enjoined from considering sex when making future job decisions relating to

¹The Honorable Henry Woods. United States District Judge for the Eastern District of Arkansas.

promotion, pay, assignment and tenure and from any sort of retaliatory conduct. The discrimination claim of Dr. Patricia Ann Behlar was denied, and she appealed. The defendants appeal primarily arguing that the district court's findings of sex discrimination were clearly erroneous. They also claim error in allowing Dr. Word's intervention, in certifying a class, the award of harassment damages, the calculation of backpay and Dr. Word's placement in a position of department director. We affirm the judgment of the district court, with the exception of its award of harassment damages, and remand this issue to the district court for further consideration.

Dr. Rachel Greer brought this class action complaining that the position of Chairperson of the Health, Physical Education and Recreation Department was filled by Dr. Joseph Cornelius, a black male, and that she was not given the position as a result of sex discrimination and was thereafter subjected to substantial harassment. Dr. Word was allowed to intervene in the action, claiming that Dr. Jesse Rancifer was appointed Director of Educational Experiences and that her unfair treatment in applying for the job was motivated by sexual discrimination.

A class was certified and the district court found for all plaintiffs except Dr. Patricia Behlar. The opinion is reported in *Greer, et al. v. University of Arkansas Board of Trustees*, 544 F. Supp. 1085 (1982). The district court in its detailed findings found that the Division of Teacher Education, and particularly the Health, Physical Education and Recreation Department, had

been "pervaded with a discriminatory attitude toward women" and that this reached gross proportions after appointment of Dr. Cornelius as department head. Dr. Cornelius "carried on an unbelievable campaign of harassment and discrimination against virtually all the women in this department." 544 F. Supp. 1091. The district court found that administrative superiors of Dr. Cornelius either were aware or should have been aware of his vendetta against the women and that this was particularly true of Dr. Walter D. Littlejohn, whom the court found had displayed insensitivity to discrimination against women on the basis of sex.

The University appellants argue that the district court's finding of intentional discrimination was clearly erroneous, that an improper burden was placed on them and that the district court erred in finding that the University's proffered reasons were pretext.

We have carefully considered the findings and conclusions of the district court, which are set out in detail in its reported opinion. It is apparent that the district court correctly allocated the burden of proof in accordance with *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668 (1973). The district court found a prima facie showing of discrimination with respect to Dr. Greer and Dr. Word. It found that the reasons for selection of Dr. Rancifer over Dr. Word were clearly pretextual and that the selection process was a charade. With respect to Dr. Greer, it found that the selection process was a farce and that Dr. Cornelius was the least

qualified of the three applicants, which included Dr. Greer and Dr. Vanette Johnson. The district court found that both Dr. Greer and Ms. Finley were subjected to acute abuse and harassment from Dr. Cornelius and awarded \$5,000 damages to Dr. Greer and \$2,500 to Ms. Finley for the harassment. The district court awarded salary differential to Ms. Alma Murphy for the period July 1977 to July 1979 and found that her salary had been substantially equalized with the men's basketball coach three years ago.

We need not outline the findings of the district court's order nor engage in a detailed discussion of the record in this case. Suffice it to say that the findings of the district court with respect to the claims of Dr. Greer, Dr. Word, Dr. Jennings, Ms. Murphy and Ms. Finley are not clearly erroneous and should be affirmed.

Similarly, with respect to the claim of Dr. Behlar, we conclude that the findings denying her claim of sex discrimination are not clearly erroneous and should also be affirmed on the basis of the district court's order.

II.

University appellants make two claims of procedural errors on the part of the district court. The first is that the district court improperly allowed Dr. Word to intervene because she had not filed a charge with the EEOC. It is claimed that this is a jurisdictional defect that defeats the order allowing intervention under Rule 24, Federal Rules of Civil Procedure. We do not find cases under Rule 24 that clearly govern this issue.

However, in cases construing Rule 23 with respect to class actions in Title VII cases, it has been held that the purpose of 42 U.S.C. § 2000e-5 (e) is to provide notice to the charged party so as to bring to bear the voluntary compliance and conciliation functions of the EEOC. When any charge is filed, these purposes are served as there is no claim of surprise in such a situation. *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). *Miller v. International Paper Co.*, 408 F.2d 283, 285 (5th Cir. 1969). The University, having been apprised of the sex discrimination claims by the other individuals, cannot now claim it was improper to allow Dr. Word to intervene so as to assert charges of the same nature.

Appellant University also argues that the district court erred in certifying a class. The record discloses that a stipulation was made by the parties with respect to the extent of the membership in the class. Under these circumstances we must reject appellant's argument. Having reviewed the record, we find no abuse of discretion in the district court's order declaring a class and proceeding to dispose of the case on the basis of the class as so certified.

III.

Appellant University makes numerous arguments concerning the damages for harassment awarded to Dr. Greer and Ms. Finley. A review of the court's order and the record in this case causes us to conclude that there was substantial evidence of harassment of these two individuals by Dr. Joe Cornelius, and that Dr. Littlejohn had knowledge of the harassment. The award of

damages, however, is against the Chancellor and against the members of the Board of Trustees of the University. We thus have an issue not only of whether the damages for harassment are appropriate but also whether the parties against whom the award was entered are properly subject to such award of damages.

This court in *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981), has held that an award of damages for humiliation or mental distress may be made in a Title VII case in order to make the person "whole." In *Williams* the district court found an actual injury but denied recovery and this court remanded for determination of damages for mental distress. 660 F.2d at 1273. Other circuits may have differing rules of damages. See *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1363-64 (11th Cir. 1982). We need not tarry long on this issue as the law of the circuit has been established and in this case plaintiff also sought recovery under 42 U.S.C. § 1983. The evidence of the particularly egregious conduct of Dr. Cornelius fully justifies an award of damages for harassment which is closely related to the mental and emotional distress recognized in other decisions. See *Harris v. Harvey*, 605 F.2d 330, 340 (7th Cir. 1979); *Simineo v. School District No. 16*, 594 F.2d 1353, 1357 (10th Cir. 1979). The damages awarded indicate that the award was of the nature of compensatory damages rather than punitive damages.

The district court findings concerning the harassment by Dr. Cornelius do not address questions of the responsibility of the University appellants for such

damages under the eleventh amendment, *Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662 (1974); *Jackson Sawmill v. United States*, 580 F.2d 802 (8th Cir. 1978), or whether the Board of Trustees and Chancellor Smith have a personal qualified immunity from liability under 42 U.S.C. § 1983, *Procurier v. Navarette*, 434 U.S. 555, 55 L. Ed. 2d 24 (1978). Further, the findings do not demonstrate whether Chancellor Smith and the Board of Trustees have personal responsibility for the acts of Cornelius or whether the liability is solely based on a theory of respondeat superior. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978); *DeShields v. U.S. Parole Commission*, 593 F.2d 354 (8th Cir. 1979). We thus lack sufficient specific findings to properly review the arguments raised with respect to damages awarded for harassment. We, therefore, remand to the district court for further findings on this issue. See *Anthan v. Professional Air Traffic Controllers*, 672 F.2d 706, 711-12 (8th Cir. 1982).

IV.

University appellants argue that the district court applied the wrong measure in calculating the backpay award because it did not consider as interim earnings the additional compensation for summer work or other overload compensation received by those plaintiffs on a nine-month contract. The district court properly considered this issue under the standards discussed in *Bing v. Roadway Express*, 485 F.2d 441 (5th Cir. 1973), and found that the amounts earned during the summer months and in the evenings during regular

school terms were in excess of their contract amounts and were compensation for services which these plaintiffs could earn in spite of their new positions. It refused to allow a deduction as interim earnings under 42 U.S.C. § 2000e-5 (g). We conclude that this finding is not clearly erroneous.

The district court did not abuse its discretion in awarding pre-judgment interest on backpay as it found that the backpay recovery was reasonably capable of being ascertained at the time of the discriminatory act and that the backpay recovery would not be complete and the plaintiffs would not be made whole without pre-judgment interest. See *General Facilities v. Nat. Marine Service*, 664 F.2d 672, 674 (8th Cir. 1981).

V.

The judgment is affirmed in all respects with the exception of the damages for harassment awarded to Dr. Greer and Ms. Finley. The judgment as to this issue is vacated and remanded for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

**Title VII to the Civil Rights Act of 1964,
42 U.S.C. § 2000e-5 (e) and (f) (1)**

42 USCS § 2000e-5

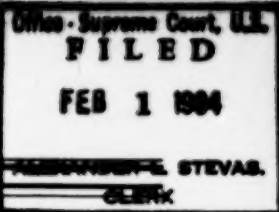
(e) **Time for filing charges.** A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) **Civil action by Commission, Attorney General, or person aggrieved.** (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision

named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge is filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circum-

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stances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.



No. 83-1186

IN THE
Supreme Court Of The United States

OCTOBER TERM 1983

UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
BRADLEY JESSON, CHAIRMAN; JACQUELINE
DOUGLAS; ROBERT PUGH; HUGH CHALMERS;
JACK WILLIAMS; HALL McADAMS, III;
KANEASTER HODGES, JR.; GUS BLASS, II;
M. A. JACKSON, M.D.; W. SYKES
HARRIS, SR.; MEMBERS OF THE BOARD *Petitioners*

vs.

RACHEL GREER & ROSE MARIE WORD *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

Memorandum and Order, *Greer, et al v. UA Bd. of Trustees, et al*, 544 F.Supp. 1085 (E.D. Ark. 1982)

Judgment, *Greer, et al v. UA Bd. of Trustees, et al*,
No. LR-C-80-232 (September 17, 1982)

Order, *Greer, et al v. UA Bd. of Trustees, et al*, No.
LR-C-80-232 (September 17, 1982)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RACHEL GREER, ET AL

PLAINTIFFS

V.

NO. LR-C-80-232

UNIVERSITY OF ARKANSAS BOARD
OF TRUSTEES, ET AL

DEFENDANTS

MEMORANDUM AND ORDER

The Pleadings

Plaintiff Rachel Greer on May 13, 1980 filed a class action suit against the Trustees and Chancellor of the University of Arkansas at Pine Bluff (hereafter UAPB), a predominantly black unit of the University of Arkansas system. She claimed violation of 42 U.S.C. § 2000(e) and 42 U.S.C. § 1983 based upon sex discrimination and denial of equal rights. She sought injunctive relief, back pay and promotion to the position of Chairperson of the Health, Physical Education and Recreation Department. For other women similarly situated, she sought injunctive relief with regard to hiring, tenure, compensation, job classification, terms, conditions, and other privileges of employment.

Plaintiff is a white female employed in the Health, Physical Education and Recreation Department (hereafter HPER), who has filed timely charges with EEOC and has obtained notice of the right to sue. The com-

plaint alleges that on March 6, 1979 a vacancy announcement for the position of Chairperson for HPER was posted, stating that applicants had until April 15, 1979 to submit their resumes and supporting documents. Plaintiff made timely application but was not given the position. Instead the vacancy was filled by Dr. Joseph Cornelius, a black male. The latter's vita was received on February 27, 1979. According to the complaint, he was the only applicant interviewed and was introduced at a luncheon on the campus as the new chairperson of HPER on March 1, 1979, five days prior to the vacancy announcement. Plaintiff Greer alleged that she was better qualified than Cornelius and had seven years of seniority with the defendant institution. She claimed that after Cornelius became head of HPER, he began a campaign of harassment and retaliation against her. Plaintiff claims sexual motivation in her lack of promotion and the harassment campaign. She further claims that the University maintains sex classification for certain job assignments whereby some jobs are limited to males and that the University discriminates against females in promotions and earnings.

The defendant University denied the allegations of the complaint. Subsequent to filing of the answer, Dr. Rosemarie Word was permitted to intervene. Dr. Word, a black female, alleged that she had applied for the position of Director of Student Teaching and Clinical Experiences on March 25, 1980 as a result of the pending retirement of Assistant Dean C. W. Dawson scheduled for June 30, 1980. On March 26, 1980 Dean Walter L. Littlejohn, Division of Teacher Education,

wrote her that the position had been filled. In May, 1980 the operational budget for UAPB was published, designating Dr. Jesse Rancifer as Assistant Professor and Director. On June 4, 1980 an announcement of the vacancy of the Director of Educational Experiences was distributed. Dr. Word's intervention claimed that the announcement contained two qualifications which previously had not been required of the incumbent — three years teaching experience at the public school level, preferably in math, and professional training or experience in the use and interpretation of statistical data. It was claimed that these qualifications were added to conform to Dr. Rancifer's personal work experience and had no valid relationship to the position. Dr. Word responded to the vacancy announcement and met with the search committee named to recommend Dawson's replacement. The intervention claimed that both Dr. Word and Dr. Rancifer were recommended without ranking but that Dr. Littlejohn advised Dr. Word that only Dr. Rancifer had been recommended. Dr. Word contends that she was more qualified, having been at UAPB for 19 years and having supervised student teachers for much of that time. In contrast, Dr. Rancifer was a new teacher with only two years of teaching experience at the college level and only three semesters of experience in supervising teachers. Dr. Word claimed that her unfair treatment was motivated by sexual discrimination. Defendants deny that the posted position had formerly been filled by Dawson and deny that the position on the operational budget was identical to that of Dawson. Defendants claim that an applicant with a math background was required to properly meet the job requirements. They further claim

that Dr. Rancifer is better qualified than Dr. Word. They substantially deny the allegations in the intervention of Dr. Word.

The parties on February 2, 1982 stipulated in open court to a class consisting of all female faculty department heads and administrators from and after July 10, 1977.

Stipulation

Prior to the trial of this cause, the parties entered into the following stipulation dated April 19, 1982:

1. The following facts are taken as true and that no further evidence of these facts will be introduced at trial.

2. The Stipulation is limited to an admission of the truth of the facts stipulated.

3. Plaintiff Greer is a tenured professor in the Health, Physical Education Department (hereinafter "HPER") at the University of Arkansas at Pine Bluff (hereinafter "UAPB"). She was initially hired in 1972 with a Ph.D. degree at the rank of Associate Professor. She has been promoted and has received tenure in accordance with the procedures of the Faculty Handbook.

4. Plaintiff Word is a tenured professor in the Elementary and Early Childhood Education Department at UAPB. She was initially hired in 1961 by UAPB's Predecessor institution, Arkansas A.M. & N.

College, with a Master's degree at the rank of Instructor. She has been promoted and has received tenure in accordance with the procedures of the faculty handbook. (In 1972 A.M. & N. was merged with the University of Arkansas by Act 512 of 1971 and became UAPB.)

5. The Court has certified a class of all female faculty, department heads and administrators from and after July 10, 1977.

6. The Defendants are the Board of Trustees of the University of Arkansas which is the governing body for the University of Arkansas System, of which UAPB is a campus. Dr. Herman B. Smith, Jr. was the Chancellor of UAPB from July 1, 1974 through June 30, 1981.

7. During the academic year 1978-79 a vacancy occurred in the HPER Department. Plaintiff Greer applied for and was denied the position. Dr. Joe Cornelius was appointed Department Head for the academic year 1979-80. Dr. Cornelius resigned July 30, 1980. Vanette Johnson was appointed Acting Department Head and Athletic Director July 1, 1980 and has served in that position to the present.

8. During the academic year 1979-80 a vacancy occurred in the Division of Teacher Education. Plaintiff Word applied for the position of Director of Teacher Experiences and was denied the position. Dr. Jesse Rancifer was officially appointed Director July 1, 1980 and has served in that position to the present.

9. The parties stipulate that the case involves no issues of disparate impact on females as evidenced by Exhibits 8 through 15 to the Stipulation.

10. Females have consistently comprised 41% — 42% of the total faculty at UAPB since 1976.

11. Females have occupied 25% to 39% of the positions of Department Heads since 1976.

12. Females have occupied 20% to 35% of the administrative positions since 1976.

13. Average salaries for females have in some instances exceeded those for males.

14. Following are the male and female promotions since 1977:

* = 12 months
- = no doctorate

1977	<u>Promoted</u>			<u>From Rank</u>	<u>Since</u>	<u>Promoted To</u>	<u>Date Hired</u>
	<u>Name</u>	<u>Sex</u>	<u>Dept.</u>				
	*Tae Ram	M	Hist.	Assoc.	1973	Prof./Chm.	1973
	Josephine Ball	F	Mus.	Asst.	1973	Assoc.	1968
	Freddie Hartfield	M	Math	Asst.	1973	Assoc.	1947
	-*Sheldon McGee	M	Mus.	Asst.	1973	Assoc.	1956
	-*Jacquelyn McCray	F	Home Ec.	Asst.	1968	Assoc.	1968
	*Lévis Faucette	F	Eng/ AcAff.	Asst.	1973	Assoc.	1968
1978	<u>Promoted</u>						
	Rachel Grant	F	HEPER	Assoc.	1976	Prof.	1972
	*Jewel T. King	F	Home Ec.	Assoc.	1973	Prof.	1968

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Quamere Morehead	F	Social.Asst.	1973	Assoc.	1965
Richard Maxwell	M	Voc. Arts Inst,	1971	Asst.	1971

1979 Promoted

-*Odie Surris, Jr.	M	Music Inst.	1975	Asst.	1975
-Terrence Corbin	M	Art Inst.	1975	Asst.	1975
-Hartwell Wilson	M	Social.Inst.	1978	Asst.	1978

1980 Promoted

*James R. Seawood	M	Voc. Arts	Assoc. 1973	Prof.	1949
*Scott Newton	M	Agri.	Asst. 1977	Assoc.	1977
Marion Olion	F	Elem. Ed.	Asst. 1977	Assoc.	1977
Chog Soo Tai	M	Hist/PolSC	Asst. 1976	Assoc.	1977
-*Henri Linton	M	Art	Asst. 1969	Assoc.	1969
*Clara Jennings	F	Elem.Ed.	Assoc. 1977	Prof.	1977
*Fadelle Olion	M	Spec.Ed.	Assoc. 1977	Prof.	1977
*Dan S. Green	M	Social.	Assoc. 1977	Prof.	1977
*Lina Godfrey	F	Home Ec.	Assoc. 1975	Prof.	1975
Laverne Hanners (Rec'd PhD '78)	F	Ed.Med.	Assoc. 1969	Prof.	1969
Juanita Torrence	F	Eng.	Assoc. 1973	Prof.	1961
Rose Word	F	Elem. Ed.	Assoc. 1973	Prof.	1961
*Bobbie Irwins	F	HDES	Assoc. 1974	Prof.	1974

1981 Promoted

*Josephine Bell	F	Mus.	Assoc. 1977	Prof.	1968
*Esther Glover	F	Home Ec.	Assoc. 1975	Prof.	1975
*Jacquelyn McGray	F	Home Ec.	Assoc. 1977	Prof.	1968
*Richard Maxwell	M	Voc. Arts	Asst. 1978	Assoc.	1971
Matthew Henry	M	Bus.	Asst. 1973	Assoc.	1969
*Carolyn Gaylord	F	Spec.Ed.	Asst. 1977	Assoc.	1977
Evra Murphy	F	Soc.	Inst. 1976	Asst.	1976
Ernest Walker	M	Indus.Tech.	Inst. 1973	Asst.	1973
*Eliz. Ferguson	F	Home Ec.	Inst. 1973	Asst.	1972
*Geraldine Buchingham	F	Bus & Econ	Inst. 1970	Asst.	1970

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15. Male and female tenure since 1977 is as follows:

TENURE*Doctorate1976

<u>Name</u>	<u>Sex</u>	<u>Dept.</u>	<u>Date Hired</u>	<u>at</u>	<u>Rank</u>	<u>Tenured</u>
*Tae Nam	M	Hist.	1973		Assoc.	1976

1977

Sandra Faucette	F	FreshStudies	1969		Inst.	1977
Eddie L. Higgins	F	Home Ec.	1972		Inst.	1977
*Jacquelyn McCray	F	Home Ec.	1968		Asst.	1977
*Jewell T. King	F	Home Ec.	1960		Inst.	1977
David Houston	M	Agri.	1975		Assoc.	1977
Kwang Lee	M	Agri.				

1979

*William McArthur	M	Arts & Scis.	1976		Assoc.	1979
Edith Neal	F	Home Ec.	1972		Inst.	1979
Ernest Walker	M	Indus.Tech	1973		Inst.	1979
William Wang	M	Bus. & Econ.	1971		Asst.	1979

1980

Chang Soo Tai	M	Hist./PolSc.	1976		Asst.	1980
*Scott Newman	M	Agri.	1977		Asst.	1980
*Marion Olion	F	Elem. Ed.	1977		Asst.	1980
*Clara Jennings	F	Elem. Ed.	1977		Assoc.	1980
*Ladelle Olion	M	Spec. Ed.	1977		Assoc.	1980
Syed M. Aijaz	M	Chem.	1976		Assoc.	1980
*Carolyn Blakeley	F	Eng.	1971		Asst.	1980
Elizabeth Ferguson (Ph.D. 1980)	F	Home Ec.	1973		Inst.	1980
*Robert Haynes	M	Agri.	1977		Assoc.	1980
Revelyn Jones	F	Eng.	1969		Inst.	1980
Laura Joseph	F	Speech&Drama	1967		Inst.	1980
Peter Lopez	M	For. Lang.	1967		Asst.	1980

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Lucille Meadows	F	Home Ec.	1972	Inst.	1980
Patricia Meadows	F	Eng.	1976	Inst.	1980
Vera Solomon	F	Eng.	1964	Asst.	1980
Betty Williams	F	Eng.	1970	Inst.	1980
*Esther Glover	F	Home Ec.	1975	Assoc.	1980

1981

O.D. Burris	M	Mus.	1975	Asst.	1981
Alice Hines	F	Eng.	1972	Inst.	1981
Lawrence Sykes	M	Lib.	1970	Assoc.	1981
Gladys Young	F	Elem. Ed.	1953	Asst.	1981

16. During the 1980-81 academic year average female salaries across all faculty ranks at UAPB exceeded average male salaries.

17. Thirty-six percent of all faculty and administrators hired since 1976 have been female.

FINDINGS OF FACT

GENERAL

1. Dr. Herman Smith was Chancellor at UAPB from July 1, 1974 until June 30, 1981. He was thus the highest ranking official during the times pertinent to this litigation. He was succeeded by the present Chancellor, Dr. Lloyd B. Hackley.

2. There were three Vice Chancellors during this period: L. A. Torrance, Vice Chancellor for Student Affairs, Aaron Van Wright, Vice Chancellor for Academic

Affairs, and Benson Otovo, Vice Chancellor for Fiscal Affairs.

3. In choosing the heads of departments in the University of Arkansas system, when there are several equally qualified applicants, the initial recommendation is made by the Dean. It then goes to upper level administration.

4. Salary decisions and promotion for a Department Chairperson are based upon recommendations by the Dean. They are then reviewed by the Vice Chancellor for Academic Affairs, the Chancellor and the President and are then approved in a budget meeting with the Board of Trustees.

5. Dr. Walter Littlejohn is Dean of the Division of Teacher Education and has held this position since 1975. When he became Dean, he reorganized Teacher Education into six departments. These were (1) HPER (Dr. Kenneth Johnson), (2) Elementary Education (Dr. Clara Jennings), (3) Secondary Education (Dr. Theodore Elliott), (4) Educational Media (Dr. A. G. Kirby), (5) Special Education and Psychology (Dr. Ladell Olion), and (6) Vocational Teacher Education (Dr. Jewell King). Dr. Jennings and Dr. King are female. The others are male. These six departments have now been reduced to four departments. Special Education and Psychology have been merged into Secondary Education under the chairmanship of Dr. Theodore B. Elliott. Educational Media has been eliminated. Two of the remaining four departments are chaired by men, Dr. Elliott and Dr. Vanette Johnson. Two are chaired

by women, Dr. King and Dr. Jennings. The salaries budgeted for these individuals in 1981-82 and 1982-83 were as follows:

	1981-82	1982-83
Dr. Clara Jennings	\$31,100	\$34,815
Dr. Vannette Johnson	31,201	33,541
Dr. Theodore Elliott	29,310	31,874
Dr. Jewell King	28,676	31,543

6. When Dr. Lloyd Hackley became Chancellor at UAPB in September, 1981, the President of the University placed all department chairpersons on an acting status in order to give Hackley flexibility in deciding whether to retain or replace them (T. 554). He has moved four chairpersons out of nineteen back to their former positions. They are Dr. Ted Elliott (Secondary Education), Dr. Clara Jennings (Elementary Education), Dr. Grace Wylie (Music) and Dr. Verlene Coleman (Music).

7. The affirmative action plan at UAPB during the previous administration was sadly lacking in concept and enforcement, particularly with respect to sexual discrimination. I find that in practice such a plan was virtually nonexistent. The new Chancellor has testified that he is going to appoint a new affirmative action officer forthwith and that the plan will be rewritten "to bring it up to date and more in line with current thinking about affirmative action" (T. 556).

8. Sex is not a significant factor statistically with regard to pay at UAPB.

9. The Division of Teacher Education and particularly the HPER Department has been pervaded with a discriminatory attitude toward women. This attitude in HPER reached gross proportions after the appointment of Dr. Joe Cornelius as Department head. Cornelius carried on an unbelievable campaign of harassment and discrimination against virtually all the women in this department. The details of the campaign will be set forth, *infra*.

10. The administrative superiors of Dr. Cornelius either were aware or should have been aware of the vendetta being carried on by the latter against the women in HPER. Particularly is this true of Dean Walter Littlejohn, who bears a major share of the responsibility for bringing Cornelius to UAPB.

11. Dean Walter Littlejohn has displayed insensitivity to discrimination against women on the basis of sex. This is demonstrated by his refusal to intercede and prevent the mistreatment to which women were subjected in HPER by Cornelius and also in the manner in which Dr. Rosemary Word and Dr. Clara Jennings were treated. This will be detailed *infra*.

DR. RACHEL GREER

1. Dr. Rachel Greer received a Bachelor of Science degree in Education and a Master's degree from the University of Central Arkansas. She received a doctorate from Northwestern State University in 1972. Since that time she has taught at UAPB and has been a full professor in the HPER Department since 1978. In this

department there are two other women, Anne Finley and Mrs. Mildred Coleman. There are five men — Dr. Vannette Johnson, the Acting Chairperson, Lennis Coleman, U. S. Grant, H. O. Clements, and Dr. Kenneth Johnson.

2. Dr. Kenneth Johnson had for many years been Departmental Chairperson of HPER. He was removed by the Chancellor in the spring of 1979, creating a vacancy in this position, effective July, 1979.

3. As a practical matter the position of HPER Chairperson was filled by the Chancellor without posting it or appointing a search committee. At the time Dr. Joe Cornelius was made department head, the fact that a vacancy was in the offing was not widely known either on the campus or in HPER. In fact, Dr. Kenneth Johnson did not know he was to be replaced (T. 10). The principal reason given by Dr. Smith for hiring Cornelius was that he had gone to a high school in California with two swimming pools, that he could probably teach swimming and that he had a nationwide breadth of experience (T. 278-80).

4. On March 1, 1979 there was a luncheon held on campus at which Chancellor Herman Smith introduced Dr. Joe Cornelius as the new Chairperson of the Department (T. 354). On April 13, 1979 all faculty members in HPER wrote a letter of protest to Dean Walter L. Littlejohn, Division of Teacher Education, protesting the manner in which Dr. Kenneth Johnson was removed. The letter, copies of which were sent to the Chancellor, made the following points:

1. Dr. Johnson was not informed in writing about his being terminated.

2. A prospective candidate for the position was interviewed here on campus prior to any notification to Dr. Johnson that he was being removed from the position.

3. Vacancy announcements pertaining to the position were circulated prior to Dr. Johnson being informed that he was to be removed.

4. No members of our department were included in the interview that has already been held.

Dr. Littlejohn responded that search committees were only utilized for the position of vice chancellor or above. He also stated:

1. Dr. Kenneth L. Johnson, through our conferences, has been since early February, knowledgeable [sic] of chairperson plans for the 1979-80 academic year.

2. The interview on campus with Dr. Joe Cornelius took place more than one month after our conference concerning the chairperson position in Health, Physical Education and Recreation.

3. Vacancy Announcements appeared more than a month after our conference with Dr. Kenneth L. Johnson, Sr.

5. The vacancy announcement dated March 6, 1979 requesting resume, supporting documents and references by April 15, 1979 set forth the following responsibilities and qualifications:

Responsibilities:

Will have the overall responsibility for the activities of the department, including: stimulating and implementing program development; advising students and teaching undergraduate students in health, physical education or recreation, and convening and chairing regularly scheduled department meetings. In addition, will participate actively in committee assignments within the University, and be expected to provide leadership in research activities and in facilitating grant proposals.

Qualifications:

Must have an earned doctorate in a field of study applicable to the curricular offerings of the department, demonstrated excellence as a teacher, and public school administrative experience or appropriate leadership ability. In addition, must have commitment to research in administration, a record of scholarly achievement, and an ability to represent the department to the educational community.

6. Dr. Greer submitted her application for the position on April 12, 1979, consisting of her vita and

letters of recommendation (PX 5). Dr. Vannette Johnson also made application at approximately the same time. Both Dr. Greer and Dr. Johnson met the criteria of the vacancy announcement and both were better qualified to head the department than Dr. Cornelius.

7. From outside the department the two candidates were Dr. Cornelius and Dr. Joe Brown, Jr. On March 22, 1979 Dr. Littlejohn sent a memo to HPER faculty requesting evaluation of these two candidates based on their vitae (PX 6). Dr. Brown was the Baseball Coach and Assistant Professor of Health & Physical Education at Albany College, Albany, Georgia (PX 8). Dr. Cornelius was Associate Professor of Health & Education at Knoxville College, Knoxville, Tennessee (PX 7). The vita from Dr. Cornelius was shown by stamp to have been received on February 27, 1979 (PX 7). The University administrators by memo dated April 5, 1979 were requested to make an evaluation of the latter, since they "had the pleasure of interacting with Dr. Joe Cornelius" (PX 9).

8. By letter dated May 2, 1979 (PX 10), Dr. Littlejohn advised Dr. Greer that her credentials were impressive and that she had the qualifications to chair HPER. However, he stated:

The nature of our thrust over the next three years in preparing teachers has influenced us to consider a person with previous experience of heading Departments of Health, Physical Education and Recreation, and with a record of success and involvement in securing private and federal grant funds.

At that time Dr. Joe Cornelius had never been a department chairperson.

9. In July, 1979 Dr. Greer filed a sex discrimination charge with EEOC in which she stated that she was denied promotion, paid unequal wages and was subjected to unfair treatment in that:

1. I was not even considered for the position of Chairman of the HPER Department by not being granted an interview by Dr. Walter Littlejohn, male, Dean of Teacher Education even though I had over seven years seniority with the respondent.

2. I had obtained my doctoral degree and the Title of Professor and was more qualified for the position than Dr. Joe Cornelius, male selectee for the position.

3. As a professor, I was paid a lower salary than Mr. Leon Hardy, male Asst. Professor. Assistant Professor is of a lower status because it requires less education and less teaching experience.

4. I was denied a higher salary in that I was not allowed to teach in the summer until 1975, and in that I am now only allowed to teach one summer term. Male teachers have always been given the option to teach both summer terms.

5. I was denied administrative experience, in that it was the policy of the Physical Education

Department that the position of Assistant to the department chairman was to be filled on a rotating basis. When it became my turn to fill the position, I was denied the opportunity. A man has continued to fill this position. (PX 12.)

10. During the time that Dr. Cornelius was head of the Department, he engaged in a campaign of harassment toward Dr. Greer. On several occasions he asked Ms. Alma Murphy, the basketball and volleyball coach how she could stand to be around those white bitches — Rachel Greer and Ann Finley — and on one occasion told Ms. Murphy that when they were in the office alone, "he would come and hold the door if Ms. Murphy would go in and whip those white bitches" (T. 390). Dr. Cornelius' equivocal explanation of these incidents is less than satisfactory and is inconsistent. Another example of the type of harassment engaged in by Dr. Cornelius is Plaintiff's Exhibit No. 13, consisting of a memo from Cornelius to Dr. Littlejohn alleging that Dr. Greer had informed him "that she did not intend to teach the courses assigned to her for the spring semester. She also explained to me at this time that she had filed a lawsuit against UAPB." I find that the allegations contained in this memo are completely false. Dr. Cornelius also assigned Dr. Greer a 7:30 A.M. and a 6:00 P.M. to 8:50 P.M. class on the same day, which was contrary to University policy and which was changed after Dr. Greer took the matter up with Dr. Van Wright, Vice Chancellor for Academic Affairs.

11. On November 26, 1979 Dr. Greer filed a complaint with the EEOC charging that Cornelius had en-

gaged in harassing and retaliatory actions against her (PX 14). Her specific charges were as follows:

Dr. Cornelius has been unreasonable and prejudicial [sic] in his assignment of course work.

1. Because our department is short one teacher, I volunteered to teach an 17 hr. class load. The normal class load is 12 hours.

2. Dr. Cornelius added to my burden by assigning to me both a 7:30 a.m. class and a 6:00-8:50 p.m. class in the same day.

3. The 7:30 night class which I have been assigned is an off campus class. It is a university policy at UAPB that employees who are given off campus teaching assignments are to be given extra compensation, when they teach an overload. Dr. Littlejohn informed me that I would not be given extra compensation for the night class I was given.

On November 15, 1979 a meeting was set up between Dr. Van Wright, Vice Chancellor of Academic Affairs, Dr. Cornelius and myself in order to discuss my teaching schedule.

1. On that same day Dr. Cornelius informed me that as a result of my badgering that my teaching load would be reduced. However, he refused to alleviate my burden of having a 7:30 p.m. class on the same day.

2. At this time Dr. Cornelius also told me that he had a few things he wanted to tell me and I was to write these things down. He then proceeded to personally attack me with the following insults:

a. "Compare your transcripts to mine — with your 5 or 6 D's; you are not superior to me."

b. "Intellectually you lack luster."

c. "I do not want anyone to emulate you; I wouldn't want anyone's daughter to emulate you."

d. "You are a disgrace to the profession and a disgrace to womanhood."

e. "You are a distasteful person."

3. Dr. Cornelius refused to sign my transcript of his speech. However, I did read my transcript to Dr. Van Wright and it was witnessed by his secretary, Mrs. Janice Favors.

These actions are in retaliation for my filing a charge of discrimination against UAPB.

12. I find that the charges made by Dr. Greer in the EEOC charge immediately *supra* are true and correct. I also find that the abusive remarks mentioned in

this charge were made by Dr. Cornelius. Dr. Cornelius' attempt to explain the "context" in which these incidents occurred is not acceptable. They were recorded at his direction contemporaneously in a handwritten memo by Dr. Greer (PX 15). Cornelius has loaded Dr. Greer's personnel file with a number of critical, nit picking memos (see, e.g. PX 16, 17, 19, 20, 21 and 24). Dr. Greer has satisfactorily explained her actions (T. 35-49), and I find the critical comments to be without basis and the result of ill will toward Dr. Greer. This will was reflected in his evaluation of Dr. Greer (PX 22) and his memo of April 16, 1980 to Dr. Littlejohn reading as follows (PX 21):

As a result of Dr. Greer's disruptive behavior in the department; continuous disregard for orderly procedures; and flagrantly missing assigned classes, I have no recommendation regarding retention of Dr. Greer at this time.

13. Dr. Greer has been an active member of the American Alliance for Health, Physical Education and Recreation which is a national organization of persons involved in these fields of study and activity. She has had a significant role in conventions of the organization (PX 25) and has held a number of committee offices. In the fall of 1979 she was nominated for the office of President-Elect of the Southern District of this organization, which covers the thirteen southern states and has a membership of 12,000 professionals. Because this would be a three-year commitment and would require Dr. Greer to be off campus at times, she had to secure the permission of Chancellor Smith to become a

candidate for the office. This request was made in a letter dated November 26, 1979 (PX 27). This permission was refused by Dr. Smith (PX 28), although a similar request was granted for a faculty member at the University of Arkansas at Little Rock. Dr. Greer was for five years the Executive Secretary-Treasurer of the Arkansas Women's Intercollegiate Sports Association (AWISA). She has also served as President of the Arkansas Association for Health, Physical Education, Recreation and Dance. Dr. Cornelius refused to give her leave to attend the national convention of AWISA, even though AWISA paid her expenses and she had attended in prior years while serving as Executive Secretary-Treasurer.

14. Dr. Cornelius was hired on the initiative of Dean Littlejohn and approval of Chancellor Smith without a rudimentary investigation being conducted of his background and qualifications. Cornelius had little or no supervisory experience. An adequate investigation would have revealed that he had administered a summer youth sports program and that his performance was unsatisfactory. In fact, his performance was so unsatisfactory that the Federal Government threatened to withdraw funding if Cornelius continued as Director. I find that Dr. Cornelius did not have the qualifications or experience of either Dr. Rachel Greer or Dr. Vannette Johnson, the other UAPB applicants for the head of HPER.

15. Dr. Greer was criticized by Chancellor Smith and Dean Littlejohn as being a chronic complainer. I find this criticism to be unjustified. From time to time

Dr. Greer did submit written suggestions to the Department Chairperson for improvement of the department (See, e.g. PX 60, 61). She also complained about a student's receiving an "A" who had not attended a class taught by one of her male colleagues (PX 62, 63).

16. Dr. Vannette Johnson is the Acting Chairperson at HPER. He was an applicant for chairperson along with Dr. Greer at the time Dr. Cornelius was selected to head the department. He had previously served as football coach and Athletic Director at UAPB. He held the latter position from 1962-1974 (T. 637). He had also served as administrative assistant to the chairperson for five or six years. I find that Dr. Johnson was far better qualified for Department Chairperson than Dr. Cornelius and that he, no less than Dr. Greer, was injured by the gross improprieties in filling this position. I find that when Dr. Cornelius was chosen as department head, neither Dr. Vanette Johnson nor Dr. Greer was properly and adequately considered for the position of chairperson.

17. When Dr. Cornelius left UAPB after a one-year stint, Dr. Vanette Johnson was made Acting Chairperson, a position which he now holds. I am not prepared to state that Dr. Greer was the victim of sexual discrimination by not being named acting chairperson. Dr. Vanette Johnson's credentials and experience are impressive. When the position of permanent Chairperson of HPER is filled, both Dr. Greer and Dr. Johnson are entitled to be considered. Sex should not be considered in filling this position. Qualifications and experience should be the touchstone.

DR. ROSEMARIE WORD

1. Dr. Rosemarie Word is Professor of Education in the Department of Elementary and Early Childhood Education. She has a Bachelor Degree and a Master of Education from the University of Arkansas and a Doctorate from Kansas State University with a major in Elementary Education and a minor in Early Childhood Education. She has been at UAPB continuously since 1961 except for a leave of absence for work at Arkansas State University with Project Headstart during the school year 1970-71 and a leave to obtain her Ph.D. 1976-78.

2. C. W. Dawson at the time of his retirement on June 30, 1980, was Assistant Dean of the Division of Education. His primary duty and responsibility was to act as the teacher certification officer and as the Director of Student Teaching. In the spring of 1980 Dr. Dawson announced his plan to retire at the end of the school year. On March 25, 1980 Dr. Word applied for the position being vacated by Mr. Dawson in a letter to Dr. Walter L. Littlejohn (PX 30). Dr. Littlejohn replied in a letter dated March 26, 1980 as follows:

Over the past several months I have made an extensive review of the credentials of all faculty within the Division of Teacher Education, and based on that review and on what we have conceived as our needs for the 1980's, a recommendation has already been made for a person to assume the majority of the responsibilities that were a part

of the job description of the assistant dean. (PX 33).

3. On March 25, 1980 Dr. Clara Jennings, Chairperson of the Department of Elementary and Early Childhood Education, wrote Dr. Littlejohn a letter of recommendation on behalf of Dr. Word (PX 31). In part the letter reads as follows:

Dr. Word's professional experiences dictate her readiness to assume such a position in Teacher Education. She serves on many State Department of Education Committees. She has worked closely with Mr. Austin Hanner, Director of Teacher Certification in the State of Arkansas on matters relative to licensing of teachers in this state. She is the Vice President of IHE Elementary/Early Childhood Organization in the state. Recently, she was appointed to the newly formed State Department of Education Resource Center Advisory Board and the Pine Bluff School District Board of Education Gifted and Talented Advisory Board. Her contact with school district superintendents across this state is hard to match.

She has a long history of supervising student teachers in institutions of higher education. She has supervised student teachers at UAPB and Kansas State at Manhattan, Kansas.

Recently, Dr. Word worked closely with the Department's Evaluation Committee on evaluating Elementary/Early Childhood Education Pro-

gram Graduates. This study is expected to be completed by the first of May, 1980.

With the above information, that only depicts part of Dr. Word's experiences, I feel that she would be most fitting to the position for which she is applying.

4. In the UAPB 1979-80 budget, four individuals are listed in the Division of Teacher Education. In the No. 2 slot is Cornelius W. Johnson, Professor at a salary of \$22,903. In the 1980-81 budget the name of Jesse L. Rancifer appears in the No. 2 slot as Assistant Professor Director at a salary of \$24,000. The other personnel are the same. The budget documents are kept in the library at UAPB. The first indication Dr. Word received that Rancifer had been appointed to Dawson's position was when Dr. Word saw the entry in the 1980-81 budget in early May, 1980. I consider it highly significant that Dr. Rancifer was budgeted to *this* position long before the vacancy was announced. On May 30, 1980 Dr. Word wrote Dr. Littlejohn another letter (PX 37) containing *inter alia* the following paragraph:

It shall not go without notice that almost 60 days have passed since you stated selection had been made for a person to assume the majority of the responsibilities that were a part of the job description of the Assistant Dean. As of this date, no announcement has been made of a successor of the incumbent who will vacate his position as of July 1, 1980. This leaves about 30 days to receive

applications, evaluate, interview, and select a successor to begin working on July 1, 1980.

No response was made to this letter, but a notice of vacancy was posted on June 4, 1980 (PX 38).

5. The notice of vacancy for Position Title "Director of Educational Experiences" mentioned, *supra* listed "Responsibilities" and "Qualifications" as follows:

RESPONSIBILITIES

Coordinator of Field Experiences for all teacher education majors and general supervision of student teachers will be a major portion of the responsibilities of the position. Other responsibilities will include serving as certification officer for teacher education, conducting follow-up studies of teacher education graduates, and providing statistical analysis of the effectiveness of the teacher education program; advising, making recommendations to, and assisting the Dean of the Division of Teacher Education in the overall operation of programs related to field experiences of students in the Division of Teacher Education.

QUALIFICATIONS

Earned doctorate, with a minimum of one degree in education, a minimum of three years of teaching experience at the public school level; preferably in mathematics, professional training or experi-

ence in the use and interpretation of statistical data. (PX 38.)

6. The section of the qualifications dealing with teaching experience in mathematics and professional training or experience in the use and interpretation of statistical data bore no reasonable relationship to the duties of this position, and the inclusion of such qualifications was simply a pretext for excluding Dr. Word from this position and making it available to Dr. Rancifer, who had taught math in high school (T. 3621).

7. For the position of Director of Educational Experiences, the qualifications of Dr. Word were superior in all respects to those of Dr. Rancifer (T. 364).

8. On July 9, 1980 Dr. Littlejohn wrote as follows:

This letter is written to inform you officially that the search committee for the Director of Educational Experiences has completed its work, and Dr. Jesse Rancifer has been recommended for the position, effective July 1, 1980. (PX 42.)

This statement was incorrect and misleading. As a matter of fact, the search committee had recommended both Dr. Word and Dr. Rancifer to be submitted unranked (PX 44).

9. In response to an inquiry of February 13, 1981, Dr. Littlejohn furnished a job description for the Director of Educational Experiences (PX 45). This job description reads as follows:

1. Certification Officer for Teacher Education
2. Development of and directing student teacher placement files.
3. Maintaining all records on laboratory experiences for the division (e.g. Secondary Education, Elementary Education, Vocational Arts, Health, Physical Education & Recreation, Special Education)
4. Supervising the utilization of the Education Building by on campus groups and outside agencies
5. Supervising the janitorial services for the Education Building
6. Planning, management and evaluation for follow-up program on Teacher Education graduates
7. Scheduling of room use for all classes in the Teacher Education Building
8. Maintaining records of Student Teacher Battery Examinations and English Proficiency Examinations for all Teacher Education majors
9. Management and evaluation of Academic Advisory Systems for the division
10. Planning and execution of other responsi-

bilities as may be assigned by the Dean of Education from time to time (PX 46)

10. The reasons given for employing Dr. Rancifer over Dr. Word as Director of Educational Experiences were pretextual. (a) The defendants state that there was a need to have a person who could teach the mathematical professional course to develop programs to comply with the new regulations of the State Department of Education for Certification in middle school mathematics. Defendants claimed that there was no one in the Division who could teach the math courses, and since the University could not hire additional people, it had to make use of the personnel presently employed. These reasons were pretextual because middle school math was not being taught at UAPB by Dr. Rancifer or anyone else. If such a course were necessary, Dr. Rancifer could teach it without being made Director. (b) Defendants claim that Dr. Word had supervised student teachers only three years out of nineteen years. I find this statement to be incorrect. Dr. Word has supervised student teachers during almost all of her nineteen years of service at UAPB. (c) Defendants claim that Dr. Rancifer worked as a graduate assistant in the capacity of Director of Educational Experiences and that Dr. Word had no such experience. They also claim that his doctoral dissertation was on student teachers and that he supervised student teachers at the high school level for many years prior to his employment at UAPB. I find that these claims asserted by the defendants are incorrect. Dr. Rancifer was associated with the Teacher Aid program at Kansas State and not as Director of Educational Ex-

periences. His dissertation title was "An Investigation of Attitudes toward Mathematics Determining the Election or Non-Election of College Preparation Mathematics by Secondary Black and White Students" (PX 55). (d) Defendants claim that Dr. Word told Dr. Littlejohn that she was only interested in directing student teaching and not in any of the other responsibilities related to the job. Dr. Word denies making such a statement and I credit her testimony and find that she made no such statement.

11. The reasons given in testimony by Dr. Littlejohn for not recommending Dr. Word for the position of Director of Educational Experiences were patently pretextual and were a thinly disguised method of discriminating against her on the basis of sex. She possessed substantially better qualifications for the position than the male applicant Rancifer and should have been awarded the position on the basis of qualifications, experience, seniority and professional standing (T. 360, 361).

12. One of the reasons that Dr. Littlejohn gave for recommending Dr. Rancifer over Dr. Word was that there was a need for follow-up studies of graduates in the teaching area. I find that this was not a valid reason for preferring Dr. Rancifer and that Dr. Word could have performed this function as well as Dr. Rancifer. Dr. Littlejohn also testified that he was more impressed by the letters of recommendation received on behalf of Dr. Rancifer. I can detect no difference in the letters of recommendation, and I regard this reason for preferring Dr. Rancifer as being pretextual. Dr. Littlejohn

also testified that Dr. Word had difficulty in associating and working with others. This testimony is not substantiated, and I do not credit it in view of other testimony concerning Dr. Word.

DR. CLARA JENNINGS

1. Dr. Clara Jennings is Chairperson of the Department of Elementary and Early Childhood Education and has occupied this position since 1976. She has a Bachelor of Science in Elementary Education from UAPB, a Masters in Education from Wayne State and a Ph.D. from Michigan State University in Elementary Education. At the time she came to UAPB in 1976, she was teaching at Herbert H. Lehman College in New York City.

2. I find that because of Dr. Jennings' support of Drs. Word and Greer, she has been harassed by her administrative superiors. For instance, she was sharply criticized in a letter dated September 23, 1981 from Dean Littlejohn for missing four monthly meetings of Academic Affairs and Educational Policies Committee and not having filed leave blanks. Two of these leave blanks were signed by Littlejohn himself, and on one occasion she was excused by Vice Chancellor Van Wright. When this was pointed out, Dr. Littlejohn criticized her for not having other representatives from her department. She then produced evidence that in at least three of the four meetings members from her department were in attendance (PX 66). I find that the criticism directed at Dr. Jennings was unjustified and

that male chairpersons missed meetings without being subjected to criticism.

3. Further evidence of the unfair manner in which Dr. Jennings was treated is apparent from her evaluation by Dean Littlejohn dated March 9, 1982 covering the period from July 1, 1981 to March 9, 1982 (PX 58). She was initially given very low ratings in Student Advisory Budget Management Reports to the Dean, Follow-Up of Graduates, Long-Range Planning, Inter-Division Cooperation, Evaluation of Faculty, Staff and Scholarly Activities. Dr. Jennings understandably took exception to this evaluation which constituted a serious reflection on her professional competence. She made a detailed response to the evaluation (PX 67). Some upward adjustments were made in her evaluation. I find that the original evaluation of Dr. Jennings was grossly unfair. While there was some upgrading, I find that the entire evaluation is tainted by sexual discrimination and should be removed from the personnel file of Dr. Jennings. I accept the testimony of Dr. Jennings with regard to the lack of basis for this extremely critical evaluation (T. 369-73).

3. In company with all other chairpersons, the President of the University of Arkansas placed Dr. Jennings in an acting status. The new Chancellor has now restored four department heads to their former positions, including Dr. Jennings. Hopefully, this presages a different attitude toward Dr. Jennings and foreshadows fair and equitable treatment toward her by the new administration.

MS. ALMA MURPHY

1. Ms. Alma Murphy has a B.S. degree from UAPB and a M.A. degree from Texas Women's University. She has 48 hours toward a Ph.D. in Physical Education. She has been at UAPB since 1967. She coaches women's basketball, volleyball and softball. From July 1, 1979 to June 30, 1980 she was the coordinator of Women's Athletics, Administrative Assistant and Women's Basketball Coach. From July 1, 1980 to June 30, 1981 she was Assistant Athletic Director, Women's Basketball Coach and instructor in HPER.

2. Ms. Murphy's salary in 1977-78 was \$12,447, while she was serving as instructor in HPER and Women's Basketball Coach. As Assistant Athletic Director and Women's Basketball Coach and instructor in HPER, she made \$22,069 for the school year 1981-82.

3. Ms. Murphy makes the same salary as the head coach of men's basketball. She is an exceptional coach and has coached her team to the national small college championship one year.

MS. ANNE FINLEY

1. Anne Finley has a B.S. degree from Northeast State University, Monroe, Louisiana, and a M.E. degree from Northwestern State University, Natchitoches, Louisiana. She has been at UAPB since 1973.

2. Ms. Finley coached volleyball, 1974-77 and complains about sexual discrimination during this period. However, it is outside the stipulated time period, and I will not consider incidents about which she testified during this period.

3. Ms. Finley's complaints are mainly concerned with her office and classroom facilities and her salary in comparison to male coaches and professors in HPER. I have examined her exhibits and testimony and find that she has not sustained her burden of proving that she is a victim of sexual discrimination in these regards.

4. I find that Ms. Finley was subjected to abuse and intimidation by Dr. Cornelius during the time that he chaired the Department (T. 428). He criticized her for belonging to professional organizations, threatened her in the event she tried to approach his administrative superiors and threatened to keep her from acquiring tenure (T. 428-29). This conduct was directed toward Ms. Finley from the outset of the Cornelius chairmanship.

5. Even though, according to applicable University regulations (these have now been changed), a professor was supposed to receive tenure after teaching at UAPB for eight years, Dr. Cornelius without any justification refused to recommend Ms. Finley for tenure. Dr. Littlejohn and Dr. Smith at first went along with Cornelius and only after a substantial delay and a vigorous assertion of her rights did Ms. Finley receive tenure. I find that in this regard Ms. Finley was incon-

venieneced and prejudiced as a result of sexual discrimination and that she is entitled to be compensated therefor.

PATRICIA ANN BEHLAR

1. Dr. Patricia Ann Behlar has a B.A. in history from the University of New Orleans and a M.C. and Ph.D. from Louisiana State University, the former in Government and the latter in Political Science. She is an Assistant Professor in the Department of History and Political Science at UAPB and has held this position for five years. She does not have tenure.

2. The Chairperson of the Department is Dr. Tae Y. Nam. The others in the department with their 1981-82 and 1982-83 salaries are as follows (PX 75):

	<u>1981-82</u>	<u>% of raise over pre- vious year</u>	<u>1982-83</u>	<u>Raise</u>	<u>%</u>
Tae Nam	\$30,000	8.56	\$31,605	\$1,305	3.0%
DeWitt Davis	22,260	-	24,263	2,003	8.9%
Buford Satcher Position	21,500	-	23,560	2,060	9.5%
Henry Wilkins III	20,083	6.23	21,489	1,406	7.9%
C. S. Tai	17,763	8.25	19,361	1,598	8.9%
John S. Taylor	15,125	-	N.I.B.		
Patricia A. Behlar	14,723	5.66	15,606	883	5.9%
Douglas Herman Position	13,000	-	14,300	1,300	10.0%

All are Ph.D.'s except Mr. Wilkins. Dr. Davis, Dr. Satcher, Dr. Tai and Mr. Wilkins are Associate Professors. The others are Assistant Professors. (T. 448).

3. Dr. Behlar's principal complaints are that she has not been assigned upper level courses and that she has been assigned several introductory history courses, when history is not her graduate field. She also complains that a faculty person with less seniority has been assigned to teach constitutional law, which is her favorite course and subject.

4. The constitutional law course was first offered in the fall of 1977 and taught by Dr. Behlar. Forty-one students registered for the course, and there were twenty-five withdrawals plus a number of student complaints. She taught the same course in the fall of 1978. Fifty-one students registered but thirty students withdrew. Her dean and department head were justifiably concerned at such a high withdrawal rate, and her department head counseled with her concerning her teaching methods. In 1979 she again taught the course. Eleven students registered and four withdrew. The drop in enrollment resulted in part because the course was dropped as a requirement for a degree in Criminal Justice. This change was made because of student complaints about Dr. Behlar's teaching. In the fall of 1980, thirteen students registered and three withdrew. In the fall of 1981 the course was assigned to Dr. John Taylor, and there were no student complaints.

5. Dr. Behlar filed a grievance with regard to the failure to assign the constitutional law class to her (T. 469). Her position was summarized in a letter to Dr. Lloyd V. Hackley, dated September 23, 1981 (PX 80): "I am protesting the assignment of Constitutional Law I, a course which I have taught since joining the UAPB

faculty in 1977, to Dr. John Taylor and the assignment of only sophomore level courses to me." The position of the administration is summarized in a letter from Vice Chancellor Van Wright to Chancellor Hackley dated October 2, 1981 (PX 80): "Both of us are in agreement that Dr. Behlar does not have a legitimate complaint or grievance."

6. Dr. Nam, who heads Dr. Behlar's department, testified that she came to UAPB as an assistant professor. He has not recommended her for promotion. His evaluation for promotion is based on the following four factors: Teaching, research, community service, and public relations (T. 576). Dr. Nam testified that he found her teaching was deficient, based on student complaints and the high dropout rate. According to Dr. Nam she has done no research and has only published book reviews (T. 577), and he found Dr. Behlar deficient in regard to community service (T. 577). He also testified that she had declined some departmental committee assignments (T. 578-80). I find that Dr. Nam has articulated legitimate nondiscriminatory reasons for failing to promote Dr. Behlar and for not assigning her to teach a course in constitutional law or upper level courses. I further find that she has failed to sustain her burden of proof that she was discriminated against on the basis of sex.

CONCLUSIONS OF LAW

The parties have stipulated that the case involves no issues of disparate impact. In a disparate treatment case "proof of discriminatory motive is critical." Kirby

v. *Colony Furniture*, 613 F.2d 696, 702 (8th Cir. 1980). Intentional discrimination must be shown in a disparate treatment case. This means that the intentional unfair employment practices are deliberate and not accidental. However, willfulness on the part of the employer is not a requisite. *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973). In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977), the Supreme Court said:

'Disparate treatment' such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

In this case I find abundant evidence of discriminatory motive in the area of sex discrimination. The motive was particularly evident in HPER, the focus of most of the complaints in this case. HPER is one of the departments within the Division of Teacher Education, which is the site of the other discriminatory treatment established in this case. Fortunately, the disparate treatment at UAPB seems to have been localized in one division and to a considerable extent within one department of that division. As the Third Circuit made clear in a recent decision, "academic institutions and

decisions are not ipso facto entitled to special treatment under federal laws prohibiting discrimination." *Kunda v. Muhlenberg College*, 621 F.2d 532, 545 (3d Cir. 1980).

The major cases are those of the plaintiff, Dr. Rachel Greer, and the intervenor, Dr. Rosemarie Word. Their cases are controlled by similar legal precedents. Clearly, both established a prima facie case of sex discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Those cases established the following criteria, amply satisfied in the cases of Greer and Word, for prima facie showing of sexual discrimination: (1) they belonged to a protected group; (2) they applied for a job for which UAPB was seeking applicants; (3) despite their qualifications, they were rejected; and (4) after their rejection the UAPB filled the position with a person of their qualifications. See, *Coble Hot Springs School District No. 6, et al*, slip opinion, p. 5 (8th Cir. 1982).

With regard to Dr. Rosemarie Word, the guidelines under the factual findings and legal precedents, *supra* are clear. While defendants attempted to articulate legitimate, nondiscriminatory reasons for choosing Dr. Jesse Rancifer over Dr. Word, the reasons are clearly pretextual and are not persuasive. Beyond any doubt Dr. Rancifer was preselected by Dr. Littlejohn and the administrative hierarchy. The selection process was a charade. It is clear that "procedural irregularities could be considered in connection with its finding that the discrimination was intentional." *Kunda v. Muh-*

lenberg College, *supra* at 545. Requirements specified in the vacancy notice bore little or no relationship to the advertised position and were included in order to tailor the vacancy announcement for conformity to Dr. Rancifer's background. See *Coble v. Hot Springs School District No. 6, et al, supra*, slip opinion pp. 11-13. Dr. Word's qualifications, seniority and experience were superior to Dr. Rancifer's and she was denied the position solely on the basis of sexual discrimination. The subjective reasons given for hiring Dr. Rancifer are unpersuasive. "When the evaluation is in any degree subjective and when the evaluators themselves are not members of the protected minority, the legitimacy and undiscriminatory basis of the articulated reasons for the decision should be subject to particularly close scrutiny by the trial judge." *Royal v. Missouri Highway & Transportation Comm.*, 655 F.2d 159, 164 (8th Cir. 1981). Defendants are directed to immediately place Dr. Rosemarie Word in the position of Director of Educational Experiences and to pay her an amount equal to the difference in the pay for this position and her salary drawn since July 1, 1980. The touchstone of Title VII remedies is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The parties are directed to agree on the latter amount and submit a joint memorandum for the entry of final judgment.

The legal principles enunciated, *supra* are also applicable to Dr. Greer's case. There are some factual similarities as well. Unquestionably Dr. Cornelius was preselected by Dr. Littlejohn and Dr. Smith for the

position before the vacancy was advertised and before there was general knowledge on campus that there was such a vacancy. As with Dr. Word, the selection process was a farce. No applications were given consideration except that of Dr. Cornelius. In addition to Dr. Greer, Dr. Vannette Johnson applied for the position. It is possible that Dr. Johnson was better qualified than either of the other applicants. Dr. Cornelius was the least qualified of the three. Nevertheless he was the only one considered as successor to Dr. Kenneth Johnson when the latter was removed as of July 1, 1979. Dr. Cornelius himself held the position for only one school term, after which Dr. Vannette Johnson was made Acting Chairperson. On the basis of the evidence adduced in this case, I cannot state that the latter decision was sexually motivated.

No permanent Chairperson of HPER has yet been named. Dr. Greer should be considered for this position, as well as Dr. Vannette Johnson and any other qualified applicants male or female. I am, however, going to render judgment in Dr. Greer's behalf in an amount equal to the difference in her salary and that of the Department head from July 1, 1979 until a permanent chairperson is selected (PX 57). In addition I will compensate her in the amount of \$5,000.00 for the abuse to which she was subjected during the tenure of Dr. Cornelius. She was unquestionably damaged by the failure to have her application properly considered and also by the abuse from Cornelius. "The fact that the discrimination in this case took place in an academic rather than commercial setting does not permit the court to abdicate its responsibility to insure the award

of a meaningful remedy." *Kunda v. Muhlenberg College*, *supra* at 550.

Like Dr. Greer, Ms. Anne Finley was also subjected to abuse and harassment from Dr. Cornelius. Her principal difficulty was that the receipt of tenure was wrongfully withheld for a period of time, and he subjected her to other abuse and harassment. Because this abuse and the withholding of tenure were motivated by an attitude of sexual discrimination, I am going to enter judgment in Ms. Finley's behalf in the amount of \$2,500.00.

Ms. Alma Murphy, who coaches women's basketball at UAPB, has compiled an exceptional record. Her salary was substantially equalized with that of the men's basketball coach three years ago for which UAPB is to be commended. However, during 1977-79, a period covered by this litigation, there was serious differential between salaries of the two coaches. UAPB recognized this inequity and has now corrected it. However, I find that Ms. Murphy is entitled in this class action litigation to the salary differential in the period July, 1977 to July, 1979. The parties are directed to agree on this figure and submit a memorandum. I will enter final judgment in this amount on behalf of Ms. Murphy.

This leaves only the claim of Dr. Clara Jennings for disposition. The only damage which she has sustained is the inclusion of a critical evaluation in her personal file at UAPB. This evaluation by Dr. Littlejohn has been discussed, *supra*. I direct that it be re-

moved from her file, destroyed and completely expunged from her personnel record.

On the basis of the factual findings, *supra*, Dr. Behlar is not awarded any relief in this proceeding. With regard to her claim, the comments of the Third Circuit in *Kunda v. Muhlenberg College, supra* are appropriate:

Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges. *Id.* at 548.

In rendering my decision in this case, I have tried to be sensitive to these considerations. The testimony, however, has revealed practices of sexual discrimination too blatant to overlook. "The status of women in academia has been a subject of concern to scholars and others." *Kunda v. Muhlenberg College, supra* at 550. For a documentation of that concern, see the comprehensive opinion of Judge Sloviter in that case and particularly pages 550-51.

Defendants are permanently enjoined from considering sex when making future job decisions relating to promotion, pay, assignment and tenure. Defendants are also directed to restrain from engaging in any sort of retaliatory conduct directed at females who are attempting to enforce their rights with respect to employment at UAPB.

This 3 day of August, 1982.

/s/ Henry Woods
HENRY WOODS
U. S. District Judge

Filed August 3, 1982
Carl R. Brents, Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RACHEL GREER, ET AL PLAINTIFFS

V. NO. LR-C-80-232

UNIVERSITY OF ARKANSAS BOARD
OF TRUSTEES, ET AL DEFENDANTS

JUDGMENT

In accordance with the Court's Memorandum and Order dated August 3, 1982 and the Order entered this

date, judgment is entered in favor of Rachel Greer in the amount of Twenty-Nine Thousand, Nine Hundred and Two Dollars (\$29,902.00), Rosemarie Word in the amount of Ten Thousand, Two Hundred and Eighty-eight Dollars (\$10,288.00), Alma Murphy in the amount of Eight Thousand, Seven Hundred and Fifty-nine Dollars (\$8,759.00) and Anne Finley in the amount of Two Thousand, Five Hundred Dollars (\$2,500.00) against the Defendants. The Defendants are directed to compensate Rachel Greer at the same rate as the Chairperson of HPER is paid until such time as that position is permanently filled, to immediately place Dr. Rosemarie Word in the position of Director of Educational Experiences and to expunge the Littlejohn evaluation dated March 9, 1982 from Dr. Clara Jennings' personnel file. The Defendants are permanently enjoined from considering sex when making future job decisions relating to promotion, pay, assignment and tenure. Defendants are also directed to restrain from engaging in any sort of retaliatory conduct directed at females who are attempting to enforce their rights with respect to employment at UAPB. Judgment shall accrue at the rate of six (6) percent per annum on \$24,902 of the Rachel Greer judgment from July 1, 1979 until entry of judgment, on all of the judgment in favor of Rosemarie Word from July 1, 1980 until entry of judgment, and on all of the judgment in favor of Alma Murphy from July 1, 1977 until entry of judgment. All of these judgments together with the balance of the Rachel Greer judgment (\$5,000) and the \$2,500 judgment in favor of Anne Finley shall accrue interest at the rate of ten (10) percent per annum from entry of judgment until they are satisfied.

This 17 day of September, 1982.

/s/ Henry Woods
HENRY WOODS
U. S. District Judge

Filed September 17, 1982
Carl R. Brents, Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RACHEL GREER, ET AL PLAINTIFFS

V. NO. LR-C-80-232

UNIVERSITY OF ARKANSAS BOARD
OF TRUSTEES, ET AL DEFENDANTS

ORDER

Briefs have been submitted by the parties on the issue of back pay, and the Court is now prepared to make its ruling on the manner in which this computation should be performed. Both sides cite *Bing v. Roadway Express*, 485 F.2d 441 (5th Cir. 1973) as authority for their respective position but differ on their interpretations of how that case affects the decision this Court must make. Generally, Title VII requires that "interim earning or amounts earnable with reasonable diligence" be subtracted from back pay awards made to successful plaintiffs. 42 U.S.C. § 2000e-5 (g). In the

instant case, the Court is faced with the issue of whether or not the "overload" or overtime compensation received by Plaintiffs Greer, Word and Murphy for services performed primarily during the summer months, but also in the evening during regular school terms, should be deducted from their back pay awards.

Backpay is an equitable remedy having as its goal the restoration of the discriminatee to the position he/she would have been in absent the illegal discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court accepts the premises of the *Bing* case that "reasonable diligence" does not require a discriminatee to work overtime in mitigation of the back pay award and that overtime work which can be performed by the discriminatee after securing the new position should not reduce the back pay award. Given this approach, this court's inquiry must focus on whether the compensation received by these plaintiffs in excess of their contract amounts was compensation which they would or would not have been able to earn if they had been serving in their new positions. The court has not been convinced by either the testimony of Dr. Hackley or by the arguments of Defendants' counsel that this additional compensation should be deducted from the backpay award as "interim earnings." The Court finds that the amounts earned by Greer, Word and Murphy in excess of their contract amounts represented compensation for services which these plaintiffs could earn in spite of their new positions. The argument that a reduction should be made due to the fact that 9 month versus 12 month contracts are involved is unpersuasive.

The Court finds that the back pay awards should be calculated as follows:

Rachel Greer

	1979-80	1980-81	1981-82	Total
Cornelius/ Johnson	25,000	28,693	30,067	
Greer	18,337	19,621	20,900	
	6,663	9,072	9,167	24,902
			harassment damages	5,000
				\$29,902

Rosemarie Word

	1980-81	1981-82	Total
Rancifer	24,000	25,680	
Word	19,030	20,362	
	4,970	5,318	10,228

Alma Murphy

	1977-78	1978-79	Total
Smith	17,000	17,850	
Murphy	12,447	13,644	
	4,553	4,205	8,759

The last issue for the court to resolve with regard to back pay is whether or not prejudgment interest should be allowed. One question which arises in addressing this issue is the applicability of federal or state law. Since Plaintiffs' back pay rights and remedies are

creatures of federal statute, a strong argument can be made that this court is not bound by state law on this issue. Rather, the Court should be guided by the equitable principles codified in Title VII to make the plaintiff "whole." However, since the Court concludes that the Plaintiffs' back pay recovery was reasonably capable of being ascertained at the time of the discriminatory act, *Red Lobster Inns v. Lawyers Title Insurance*, 656 F.2d 381 (8th Cir. 1981), *Lovell v. Marianna Federal Savings & Loan*, 267 Ark. 164, 589 S.W.2d 597 (1979), *Wooten v. McClendon*, 272 Ark. 61, 612 S.W.2d 105 (1981), the question of federal versus state law is not determinative.

Prejudgment interest serves at least two purposes: (1) it helps compensate plaintiffs for the true cost of money damages they have incurred, and (2) where liability and the amount of damages are fairly certain, it promotes settlement and deters an attempt to benefit unfairly from the inherent delays of litigation.

General Facilities v. National Marine Service, 664 F.2d 672, 674 (8th Cir. 1981).

In this case the plaintiffs' equitable "back pay" recovery would not be complete and they would not be made "whole" without the inclusion of prejudgment interest in the award.

In accordance with the above findings and conclusions and the Memorandum and Order filed August 3, 1982, judgment will be entered.

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This 17 day of September, 1982.

/s/ Henry Woods
HENRY WOODS
U. S. District Judge

Filed September 17, 1982
Carl R. Brents, Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RACHEL GREER, ET AL . PLAINTIFFS

V. NO. LR-C-80-232

UNIVERSITY OF ARKANSAS BOARD
OF TRUSTEES, ET AL DEFENDANTS

ORDER

Upon application of the Defendants and without objection from Plaintiffs, the Court has considered and finds that for good cause shown the immediate placement of Dr. Rosemarie Word into the position of Director of Education Experiences should be and is hereby stayed until January, 1983.

This Court has considered and it is hereby ordered that the payment of any monetary awards for back pay and damages is stayed pending appeal.

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IT IS SO ORDERED on this 17 day of September,
1982.

/s/ Henry Woods
HENRY WOODS
U. S. District Judge

Filed September 17, 1982
Carl R. Brents, Clerk

No. 83-1186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
BRADLEY JESSON, CHAIRMAN; JACQUELINE
DOUGLAS; ROBERT PUGH; HUGH CHALMERS;
JACK WILLIAMS; HALL McADAMS, III;
KANEASTER HODGES, JR.; GUS BLASS, II;
M. A. JACKSON, M.D.; W. SYKES HARRIS,
SR.; MEMBERS OF THE BOARD

Petitioners,

vs.

RACHEL GREER AND ROSE MARIE WORD
Respondents.

On Writ of Certiorari to the United
States Court of Appeals for
the Eighth Circuit

**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI**

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No. 83-1186

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1983

**UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
BRADLEY JESSON, CHAIRMAN; JACQUELINE
DOUGLAS; ROBERT PUGH; HUGH CHALMERS;
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KANEASTER HODGES, JR.; GUS BLASS, II;
M. A. JACKSON, M.D.; W. SYKES HARRIS,
SR.; MEMBERS OF THE BOARD**

Petitioners,

VS.

RACHEL GREER AND ROSE MARIE WORD
Respondents.

**On Writ of Certiorari to the United
States Court of Appeals for
the Eighth Circuit**

**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI**

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit has recently been reported as *Behlar v. Smith*, 719 F.2d 950 (8th Cir. 1983).

STATUTES AND RULES WHICH THE CASE INVOLVES

This case concerns an interpretation of Rule 24 of the Federal Rules of Civil Procedure. More specifically, the court is asked to interpret Rule 24(b)(2) which provides that a district court may grant an application for intervention "when an applicant's claim or defense and the main action have a question of law and fact in common."

This case also concerns an interpretation of Rule 23 of the Federal Rules of Civil Procedure insofar as it applies to cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Additionally, it concerns 42 U.S.C. §20003-5(e) and (f)(1) regarding jurisdictional prerequisites to suit.

STATEMENT OF THE CASE

Plaintiff Greer was rejected for the position of Department Chairperson of the Health, Physical Education and Recreation Department (hereafter HPER) at the University of Arkansas at Pine Bluff. She filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission, and filed a second charge alleging retaliation in November, 1979. She subsequently filed a class action complaint on May 13, 1980, alleging across-the-board sex discrimination, including discrimination in the areas of salary and promotion, pursuant to 42 U.S.C. §1983 and 2000e.

In July, 1980, intervenor Word was rejected for the position of Director of Educational Experiences in the Division of Teacher Education at the University of Arkansas at Pine Bluff. Subsequent to filing of the Answers to Greer's complaint, in March, 1981, Word filed her application for intervention. The intervention was granted in August, 1981, and the case was certified a class action in February, 1982. Trial was commenced in the district court for the Eastern District of Arkansas on April 19, 1982, Honorable Henry Woods presiding.

The district court ruled in favor of the plaintiffs in August, 1982. The opinion is reported in *Greer, et al. v. University of Arkansas Board of Trustees*, 544 F.Supp. 1085 (1982). The district court found that the reasons for selection of a male over intervenor Word were clearly pretextual, and that the selection process used to choose Dr. Joseph Cornelius, a black male, over plaintiff Greer, was a "farce". The defendant university appealed on numerous issues, including the issue of whether the district court improperly allowed Word to intervene because she had not filed a charge with the EEOC.

The court of appeals affirmed on all issues except on the issue of whether damages for harassment were allowable and then remanded the case to the district court for further findings.

The defendant university filed a petition for writ of certiorari to the Eighth Circuit Court of Appeals on the issue of whether a person may intervene in a Title VII case which had not been certified as a class action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, if the person had not timely filed a charge of discrimination with the EEOC and not received and acted upon a right to sue letter.

The petition states that this court has jurisdiction pursuant to 28 U.S.C. §1254 and that the issue is ripe for review because there is a "split among the circuits." It is respondent's position that there is no real split among the circuits on this precise question, as the cases upon which petitioner relies are distinguishable from the instant case.

BASIS FOR FEDERAL COURT JURISDICTION

The district courts have jurisdiction over claims of civil rights violations pursuant to 28 U.S.C. §§1343, 1344, 2201, and 2202. The civil rights violations in this case were claimed pursuant to 42 U.S.C. §§1983 and 2000e.

SUMMARY OF ARGUMENT

The petition for writ of certiorari is based on three premises which have no merit. The decision of the Eighth Circuit upholding the district court's grant of intervention under Rule 24(b) to a plaintiff who had not filed an EEOC charge is supported by the decision rendered by this court in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) and the majority of cases which have analyzed the permissive intervention issue with regard to Title VII litigation.

The purpose of 42 U.S.C. §2000(e)(5) is to provide notice to the charged party in order to "bring to bear the voluntary compliance and conciliation functions of the EEOC." The Eighth Circuit's holding with regard to intervenor Word is entirely consistent with this purpose, and it reinforces the standards set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

There is no actual dispute among the circuits on this issue. The Eighth Circuit's position is in accord with the rulings of the Eleventh Circuit and the District of Columbia Circuit. The only holding which is arguably inconsistent with these rulings is *Inda v. United States Airlines, Inc.*, 565 F.2d 554 (9th Cir. 1971), *cert. denied*, 435 U.S. 1007, cited by petitioner, but that case is distinguishable on its facts alone.

The Eighth Circuit has adhered to the rationale articulated by the Fifth Circuit in two significant cases: *Oatis v. Crown-Zellerback Corp.*, 398 F.2d 496 (5th Cir. 1968), and *Wheeler v. American Home Products Corporation*, 563 F.2d 1233 (5th Cir. 1977), and, thus, its decision in the instant matter is consistent with the accepted course of judicial proceedings in Title VII cases.

Therefore, for the foregoing reasons, there are no grounds for a grant of a writ of certiorari in the instant case.

ARGUMENT

Petitioner's petition for a writ of certiorari according to Rule 17.1 of the Rules of the Supreme Court of the United States, is based on three grounds, which are as follows: first, because the Eighth Circuit Court of Appeals has rendered a decision "in conflict with" the Ninth Circuit on the same matter; secondly, because the Eighth Circuit has rendered a decision which is "contrary to its own previous rule for permissive intervention under Rule 24, Federal Rules of Civil Procedure;" and lastly, because the Eighth Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings in Title VII cases" and has so far sanctioned such a departure by the district court, as to require supervision by this Court. See: Rule 17.1 (a), Rules of the Supreme Court of the United States.

Petitioner has framed the issue for review as follows: "Whether a person may intervene pursuant to Rule 24 (b)...in a Title VII case which has not been certified as a class action, if the person has not timely filed a charge of discrimination with the EEOC and has not received and acted upon a right to sue letter."

Petitioner's argument ignores the controlling case law in the Eighth Circuit and in other circuits on the issue of permissive intervention in Title VII cases. The Eighth Circuit in *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977) held that in a multiple-plaintiff, non-class action suit, every original plaintiff is not required to file charges with the EEOC as a jurisdictional prerequisite. In *Allen*, only two of fifteen plaintiffs had filed EEOC charges. The Court concluded that all fifteen were entitled to assert their claims for backpay and seniority and reasoned that the rationale articulated early in the history of Title VII litigation by the Fifth Circuit in *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), was applicable to the *Allen* plaintiffs. The *Oatis* court held:

"It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical compliants with the EEOC."

Id at 498.

The Fifth Circuit extended this rule to intervenors in *Wheeler v. American Home Products Corporation*, 563 F.2d 1233 (5th Cir. 1977), a case in which class certification was denied. Subsequent to *Wheeler* and *Oatis*, several circuits have adopted their analysis of permissive intervention and interpretation of Rule 24 of the Federal Rules of Civil Procedure. *Burkhalter v. Montgomery Wards & Co., Inc.*, 676 F.2d 291 (9th Cir. 1982); *Crawford v. United States Steel*, 660 F.2d 663 (11th Cir. 1981); *Foster v. Geuory*, 655 F.2d 1319 (D.C. Cir. 1981).

The present case was certified a class action in February, 1982, subsequent to Word's application for intervention, which was filed in March, 1981, and granted in August, 1981. Petitioner makes much of the fact that the class had not been certified at the time that the court granted permissive intervention, as though this sequence should restrict Word's rights under Rule 24. Such an interpretation has no basis in Rules 23 or 24, nor in the established legal precedent. If the *Oatis-Wheeler* analysis originally articulated by the Fifth Circuit and followed by the Eighth Circuit and all others having occasion to rule on the matter is good law, it clearly establishes that an individual plaintiff in a Title VII action in which *no* class has been certified may intervene, pursuant to Rule 24(b), without filing a charge with the EEOC. *Allen, supra*. Thus, the instant case, where class certification has been granted, should be governed by the *Oatis-Wheeler* analysis of Rule 24 permissive intervention.

Petitioner has asked this court to review that portion of the Eighth Circuit's decision which states that the *Purpose* of 42 U.S.C. §2000(e)(5) with respect to class actions is to "provide notice to the charged party so as to bring to bear the voluntary compliance and conciliation functions of the EEOC." *Behlar*

v. *Smith*, 719 F.2d 950, 953 (8th Cir. 1983). Not only is the court's interpretation consistent with this purpose, it is entirely consistent with the usual course of judicial proceedings in Title VII cases, and the standards set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) and *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

The seminal case in the area of intervention, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), adopted the same analysis regarding the purpose and legislative intent of Title VII that the Eighth Circuit applied in the instant case. In *United Airlines, supra*, originally *Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976), the district court had allowed twelve individuals to intervene after the motion for class certification was denied. After judgment had been entered, a putative member of the original class filed a motion to intervene without filing a charge of discrimination with the EEOC.

This Court upheld the Seventh Circuit's decision to grant permissive intervention, reasoning that the company had been *put on notice* by the filing of the Romasanta complaint of the "possibility of classwide liability." (Emphasis added). The court noted that the starting point in deciding the issue of permissive intervention under Rule 24(b) is to determine whether the intervenor(s) are conceptually members of the class represented by the original plaintiff. Under Rule 23(a)(2), one of the prerequisites to a class action is that "there are questions of law or fact common to class." Therefore, the controlling purpose of both rules is the same.

Petitioner argues that the "critical factor" in determining whether an individual must file an EEOC charge to satisfy the jurisdictional requirement prior to intervention is the similarity of the plaintiff's claim and the claim of the intervenor. *Foster, supra*. This position is simply a restatement of the *United Airlines* rule, which the Eighth Circuit has fully adopted.

In the present case, the claims of the respondents Greer and Word are so similar that their chronological separation is immaterial to the issue of intervention. Greer had alleged that she was denied the position of permanent Chairperson of the Health, Physical Education and Recreation Department (HPER) because of her sex, and subjected to unfair treatment during the application process and after a male was selected for the position.

Intervenor Word alleged that she was denied the position of Director of Educational Experiences and was subjected to unfair treatment during the application process because of her sex. Both respondents alleged that they suffered discrimination at the hands of their administrative superiors and that University officials knew of and acquiesced in this discriminatory treatment. The district court granted class-wide injunctive relief on the issues of promotion, pay, assignment and tenure. Under the *United Airlines* rationale, respondent Word was a member of the class which Greer sought to represent.

This court should not grant a writ of certiorari because there is no real dispute among the circuits on the issue of permissive intervention in Title VII cases. The longstanding rule articulated by *Wheeler* has been consistently followed by the Eighth Circuit and is consistent with the holdings in *Crawford v. United States Steel, supra*, and *Foster v. Geuory, supra*, both cases cited by petitioner. Further, the decision by the Ninth Circuit in *Inda v. United States Airlines*, 565 F.2d 554 (9th Cir. 1971), *cert. denied*, 435 U.S. 1007, where the court distinguished between class members and named plaintiffs, is so distinguishable from the instant case on the facts as to render its application to the instant case meaningless.

In *Inda*, neither of the co-plaintiffs had filed timely charges with the EEOC prior to instituting their lawsuit against United Airlines. The defendant had argued that the district court was without jurisdiction over either of the co-plaintiffs. Additional-

ly, the co-plaintiffs had filed a motion to certify the matter as a class action, but that motion was denied. The *Inda* facts are clearly inapplicable to the present case, where Greer's EEOC charge was timely filed and the class was certified by the district court. It is important also to recall that the class certification in the instant case was pursuant to a stipulation of counsel.

Contrary to petitioner's assertions, the situations in *Inda* and *Crawford* are not "almost identical." Rather, *Crawford* concerned a situation where the district court had granted judgment against seven of the plaintiffs because they had failed to file charges with the EEOC. *Crawford* on appeal reversed the district court on the intervention issue and relying on the *Oatis-Wheeler* rationale, held the intervention proper. Although this Court should grant a writ of certiorari when there is a real conflict in the circuits on a specific issue, *Shapiro v. United States*, 235 U.S. 412 (1914), there is no real conflict in the circuits regarding the issue of permissive intervention in Title VII cases.

Finally, the decision of the Eighth Circuit is distinguishable from its holding in *Babcock & Wilcox v. Parsons Corporation*, 430 F.2d 531 (8th Cir. 1970). In *Babcock & Wilcox*, jurisdiction was based on diversity of citizenship and there were no administrative remedies available to the plaintiff, comparable to the EEOC review. The *Babcock & Wilcox* court drew a distinction between intervention as of right and permissive intervention. This distinction is inapplicable to Title VII cases for two reasons. First, the rule requiring independent jurisdictional grounds for permissive intervention in Title VII suits is unnecessary. The express language of Rule 24(b)(2) of the Federal Rules of Civil Procedure, which provides that a district court may grant permissive intervention when there are common questions of law and fact, has been interpreted by the circuits consistently to mean that Title VII plaintiffs must be "similarly situated." Thus, the same determination must be made in either case.

Secondly, requiring independent jurisdictional grounds for permissive intervention in Title VII cases would contravene the whole purpose of Title VII. As long as plaintiffs in Title VII cases satisfy the requirements of Rule 24(b)(2) and assert essentially the same issues against an employer, it would be "nonsensical" to require each of them to file EEOC charges. As the Court stated in *Oatis v. Crown Zellerbach Corp.*, *supra*, 398 F.2d at 498, with regard to plaintiffs who alleged race discrimination:

"Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief...would tend to frustrate our system of justice and order."

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be denied because there is no real conflict among the circuits, and the Eighth Circuit's rule in *Babcock & Wilcox*, *supra*, is distinguishable from the rule for permissive intervention in Title VII cases. Finally, the Eighth Circuit has followed the established legal precedent on this issue.

Respectfully submitted,

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BY: PHILIP E. KAPLAN

BY: KAREN L. ARNDT
Counsel For Respondents

CERTIFICATE OF SERVICE

I, Karen L. Arndt, hereby certify that a copy of the above and foregoing document has been mailed on this 6th day of April, 1984, to: Mr. Steve Clark, Attorney General's Office, State Capitol Grounds, Little Rock, Arkansas 72201; Mr. Ray Trammell, 405 Administration Building, University of Arkansas, Fayetteville, Arkansas 72702; and Ms. Nelwyn Davis, 1700 First Commercial Building, Little Rock, Arkansas 72201.

KAREN L. ARNDT